

ARTICLE 4

CREATION, VALIDITY, MODIFICATION, AND TERMINATION OF TRUST

General Comment

Sections 401 through 409, which specify the requirements for the creation of a trust, largely codify traditional doctrine. Section 401 specifies the methods by which trusts are created, that is, by transfer of property, self-declaration, or exercise of a power of appointment. Whatever method may have been employed, other requirements, including intention, capacity and, for certain types of trusts, an ascertainable beneficiary, also must be satisfied before a trust is created. These requirements are listed in Section 402. Section 403 addresses the validity in the enacting jurisdiction of trusts created in other jurisdictions. A trust not created by will is validly created if its creation complied with the law of specified jurisdictions in which the settlor or trustee had a significant contact. Section 404 forbids trusts for illegal or impossible purposes, and requires that a trust and its terms must be for the benefit of its beneficiaries. Section 405 recites the permitted purposes of a charitable trust. Section 406 lists some of the grounds for contesting a trust. Section 407 validates oral trusts. The remaining sections address what are often referred to as “honorary” trusts, although such trusts are valid and enforceable under this Code. Section 408 covers a trust for the care of an animal; Section 409 allows creation of a trust for another noncharitable purpose such as maintenance of a cemetery lot.

Sections 410 through 417 provide a series of interrelated rules on when a trust may be terminated or modified other than by its express terms. The overall objective of these sections is to enhance flexibility consistent with the principle that preserving the settlor’s intent is paramount. Termination or modification may be allowed upon beneficiary consent if the court concludes that the trust or a particular provision no longer achieves a material purpose or if the settlor concurs (Section 411), by the court in response to unanticipated circumstances or due to ineffective administrative terms (Section 412), or by the court or trustee if continued administration under the trust’s existing terms would be uneconomical (Section 414). A trust may be reformed to correct a mistake of law or fact (Section 415), or modified to achieve the settlor’s tax objectives (Section 416). Trusts may be combined or divided (Section 417). A trustee or beneficiary has standing to petition the court with respect to a proposed termination or modification (Section 410).

Section 413 codifies and at the same time modifies the doctrine of cy pres, at least as applied in most States. The Uniform Trust Code authorizes the court to apply cy pres not only if the original means becomes impossible or unlawful but also if the means become impracticable or wasteful. Section 413 also creates a presumption of general charitable intent. Upon failure of the settlor’s original plan, the court cannot divert the trust property to a noncharity unless the terms of the trust expressly so provide. Furthermore, absent a contrary provision in the terms of the trust, limits are placed on when a gift over to a noncharity can take effect upon failure or

impracticality of the original charitable purpose. The gift over is effective only if, when the provision takes effect, the trust property is to revert to the settlor and the settlor is still living, or fewer than 21 years have elapsed since the date of the trust's creation.

The requirements for a trust's creation, such as the necessary level of capacity and the requirement that a trust have a legal purpose, are controlled by statute and common law, not by the settlor. See Section 105(b)(1), (3). Nor may the settlor negate the court's ability to modify or terminate a trust as provided in Sections 410 through 416. See Section 105(b)(4). However, a settlor is free to restrict or modify the trustee's power to terminate an uneconomic trust as provided in Sections 414, and the trustee's power to combine and divide trusts as provided in Section 417.

SECTION 401. METHODS OF CREATING TRUST. A trust may be created by:

(1) transfer of property to another person as trustee during the settlor's lifetime or by will or other disposition taking effect upon the settlor's death;

(2) declaration by the owner of property that the owner holds identifiable property as trustee; ~~or~~

(3) exercise of a power of appointment in favor of a trustee; ~~or~~

(4) a court pursuant to its statutory or equitable powers.

Comment

This section is based on Restatement (Third) of Trusts Section 10 (Tentative Draft No. 1, approved 1996), and Restatement (Second) of Trusts Section 17 (1959). Under the methods specified for creating a trust in this section, a trust is not created until it receives property. For what constitutes an adequate property interest, see Restatement (Third) of Trusts Sections 40-41 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Sections 74-86 (1959). The property interest necessary to fund and create a trust need not be substantial. A revocable designation of the trustee as beneficiary of a life insurance policy or employee benefit plan has long been understood to be a property interest sufficient to create a trust. See Section 103(12) ("property" defined). Furthermore, the property interest need not be transferred contemporaneously with the signing of the trust instrument. A trust instrument signed during the settlor's lifetime is not rendered invalid simply because the trust was not created until property was transferred to the trustee at a much later date, including by contract after the settlor's death. A pourover devise to a previously unfunded trust is also valid and may constitute the property interest creating the trust. See Unif. Testamentary Additions to Trusts Act Section 1 (1991), codified at Uniform Probate Code Section 2-511 (pourover devise to trust valid regardless of

existence, size, or character of trust corpus). See also Restatement (Third) of Trusts Section 19

(Tentative Draft No. 1, approved 1996).

While this section refers to transfer of property to a trustee, a trust can be created even though for a period of time no trustee is in office. See Restatement (Third) of Trusts Section 2 cmt. g (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts Section 2 cmt. i (1959). A trust can also be created without notice to or acceptance by a trustee or beneficiary. See Restatement (Third) of Trusts Section 14 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts Sections 35-36 (1959).

The methods specified in this section are not exclusive. Section 102 recognizes that trusts can also be created by special statute or court order. See also Restatement (Third) of Trusts Section 1 cmt. a (Tentative Draft No. 1, approved 1996); Unif. Probate Code Section 2-212 (elective share of incapacitated surviving spouse to be held in trust on terms specified in statute); Unif. Probate Code Section 5-411(a)(4) (conservator may create trust with court approval); Restatement (Second) of Trusts Section 17 cmt. i (1959) (trusts created by statutory right to bring wrongful death action).

A trust can also be created by a promise that creates enforceable rights in a person who immediately or later holds these rights as trustee. See Restatement (Third) of Trusts Section 10(e) (Tentative Draft No. 1, approved 1996). A trust thus created is valid notwithstanding that the trustee may resign or die before the promise is fulfilled. Unless expressly made personal, the promise can be enforced by a successor trustee. For examples of trusts created by means of promises enforceable by the trustee, see Restatement (Third) of Trusts Section 10 cmt. g (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts Sections 14 cmt. h, 26 cmt. n (1959).

A trust created by self-declaration is best created by reregistering each of the assets that comprise the trust into the settlor's name as trustee. However, such reregistration is not necessary to create the trust. See, e.g., *In re Estate of Heggstad*, 20 Cal. Rptr. 2d 433 (Ct. App. 1993); Restatement (Third) of Trusts Section 10 cmt. e (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts Section 17 cmt. a (1959). A declaration of trust can be funded merely by attaching a schedule listing the assets that are to be subject to the trust without executing separate instruments of transfer. But such practice can make it difficult to later confirm title with third party transferees and for this reason is not recommended.

While a trust created by will may come into existence immediately at the testator's death and not necessarily only upon the later transfer of title from the personal representative, Section 701 makes clear that the nominated trustee does not have a duty to act until there is an acceptance of the trusteeship, express or implied. To avoid an implied acceptance, a nominated testamentary trustee who is monitoring the actions of the personal representative but who has not yet made a final decision on acceptance should inform the beneficiaries that the nominated trustee has assumed only a limited role. The failure so to inform the beneficiaries could result in liability if misleading conduct by the nominated trustee causes harm to the trust beneficiaries. See

Restatement (Third) of Trusts Section 35 cmt. b (Tentative Draft No. 2, approved 1999).

While this section confirms the familiar principle that a trust may be created by means of the exercise of a power of appointment (paragraph (3)), this Code does not legislate comprehensively on the subject of powers of appointment but addresses only selected issues. See Sections 302 (representation by holder of general testamentary power of appointment); 505(b) (creditor claims against holder of power of withdrawal); and 603(b) (rights of holder of power of withdrawal). For the law on powers of appointment generally, see Restatement (Second) of Property: Donative Transfers Sections 11.1-24.4 (1986); Restatement (Third) of Property: Wills and Other Donative Transfers (in progress).

SECTION 402. REQUIREMENTS FOR CREATION.

(a) A trust is created only if:

- (1) the settlor has capacity to create a trust;
- (2) the settlor indicates an intention to create the trust;
- (3) the trust has a definite beneficiary or is:
 - (A) a charitable trust;
 - (B) a trust for the care of an animal, as provided in Section 408; or
 - (C) a trust for a noncharitable purpose, as provided in Section 409;
- (4) the trustee has duties to perform; and
- (5) the same person is not the sole trustee and sole beneficiary.

(b) A beneficiary is definite if the beneficiary can be ascertained now or in the future, subject to any applicable rule against perpetuities.

(c) A power in a trustee to select a beneficiary from an indefinite class is valid. If the power is not exercised within a reasonable time, the power fails and the property subject to the power passes to the persons who would have taken the property had the power not been conferred.

Comment

Subsection (a) codifies the basic requirements for the creation of a trust. To create a valid trust, the settlor must indicate an intention to create a trust. See Restatement (Third) of Trusts Section 13 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts Section 23 (1959). But only such manifestations of intent as are admissible as proof in a judicial proceeding may be considered. See Section 103(18) (“terms of a trust” defined).

To create a trust, a settlor must have the requisite mental capacity. To create a revocable or testamentary trust, the settlor must have the capacity to make a will. To create an irrevocable trust, the settlor must have capacity during lifetime to transfer the property free of trust. See Section 601 (capacity of settlor to create revocable trust), and see generally Restatement (Third) of Trusts Section 11 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts Sections 18-22 (1959); and Restatement (Third) of Property: Wills and Other Donative Transfers Section 8.1 (Tentative Draft No. 3, 2001).

Subsection (a)(3) requires that a trust, other than a charitable trust, a trust for the care of an animal, or a trust for another valid noncharitable purpose, have a definite beneficiary. While some beneficiaries will be definitely ascertained as of the trust’s creation, subsection (b) recognizes that others may be ascertained in the future as long as this occurs within the applicable perpetuities period. The definite beneficiary requirement does not prevent a settlor from making a disposition in favor of a class of persons. Class designations are valid as long as the membership of the class will be finally determined within the applicable perpetuities period. For background on the definite beneficiary requirement, see Restatement (Third) of Trusts Sections 44-46 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Sections 112-122 (1959).

Subsection (a)(4) recites standard doctrine that a trust is created only if the trustee has duties to perform. See Restatement (Third) of Trusts Section 2 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts Section 2 (1959). Trustee duties are usually active, but a validating duty may also be passive, implying only that the trustee has an obligation not to interfere with the beneficiary’s enjoyment of the trust property. Such passive trusts, while valid under this Code, may be terminable under the enacting jurisdiction’s Statute of Uses. See Restatement (Third) of Trusts Section 6 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts Sections 67-72 (1959).

Subsection (a)(5) addresses the doctrine of merger, which, as traditionally stated, provides that a trust is not created if the settlor is the sole trustee and sole beneficiary of all beneficial interests. The doctrine of merger has been inappropriately applied by the courts in some jurisdictions to invalidate self-declarations of trust in which the settlor is the sole life beneficiary but other persons are designated as beneficiaries of the remainder. The doctrine of merger is properly applicable only if all beneficial interests, both life interests and remainders, are vested in the same person, whether in the settlor or someone else. An example of a trust to which the

doctrine of merger would apply is a trust of which the settlor is sole trustee, sole beneficiary for life, and with the remainder payable to the settlor's probate estate. On the doctrine of merger generally, see Restatement (Third) of Trusts Section 69 (Tentative Draft No. 3, 2001); Restatement (Second) of Trusts Section 341 (1959).

Subsection (c) allows a settlor to empower the trustee to select the beneficiaries even if the class from whom the selection may be made cannot be ascertained. Such a provision would fail under traditional doctrine; it is an imperative power with no designated beneficiary capable of enforcement. Such a provision is valid, however, under both this Code and the Restatement, if there is at least one person who can meet the description. If the trustee does not exercise the power within a reasonable time, the power fails and the property will pass by resulting trust. See Restatement (Third) of Trusts Section 46 (Tentative Draft No. 2, approved 1999). See also Restatement (Second) of Trusts Section 122 (1959); Restatement (Second) of Property: Donative Transfers Section 12.1 cmt. e (1986).

SECTION 403. TRUSTS CREATED IN OTHER JURISDICTIONS. A trust not created by will is validly created if its creation complies with the law of the jurisdiction in which the trust instrument was executed, or the law of the jurisdiction in which, at the time of creation:

- (1) the settlor was domiciled, had a place of abode, or was a national;
- (2) a trustee was domiciled or had a place of business; or
- (3) any trust property was located.

Comment

The validity of a trust created by will is ordinarily determined by the law of the decedent's domicile. No such certainty exists with respect to determining the law governing the validity of inter vivos trusts. Generally, at common law a trust was created if it complied with the law of the state having the most significant contacts to the trust. Contacts for making this determination include the domicile of the trustee, the domicile of the settlor at the time of trust creation, the location of the trust property, the place where the trust instrument was executed, and the domicile of the beneficiary. See 5A Austin Wakeman Scott & William Franklin Fratcher, *The Law of Trusts* Sections 597, 599 (4th ed. 1987). Furthermore, if the trust has contacts with two or more states, one of which would validate the trust's creation and the other of which would deny the trust's validity, the tendency is to select the law upholding the validity of the trust. See 5A Austin Wakeman Scott & William Franklin Fratcher, *The Law of Trusts* Section 600 (4th ed. 1987).

Section 403 extends the common law rule by validating a trust if its creation complies with the law of any of a variety of states in which the settlor or trustee had significant contacts. Pursuant to Section 403, a trust not created by will is validly created if its creation complies with the law of the jurisdiction in which the trust instrument was executed, or the law of the jurisdiction in which, at the time of creation the settlor was domiciled, had a place of abode, or was a national; the trustee was domiciled or had a place of business; or any trust property was located.

Section 403 is comparable to Section 2-506 of the Uniform Probate Code, which validates wills executed in compliance with the law of a variety of places in which the testator had a significant contact. Unlike the UPC, however, Section 403 is not limited to execution of the instrument but applies to the entire process of a trust's creation, including compliance with the requirement that there be trust property. In addition, unlike the UPC, Section 403 validates a trust valid under the law of the domicile or place of business of the designated trustee, or if valid under the law of the place where any of the trust property is located.

The section does not supercede local law requirements for the transfer of real property, such that title can be transferred only by recorded deed.

SECTION 404. TRUST PURPOSES. A trust may be created only to the extent its purposes are lawful, ~~not contrary to public policy,~~ and possible to achieve. A trust and its terms must be for the benefit of its beneficiaries as the interests of such beneficiaries are defined under the terms of the trust.

Comment

For an explication of the requirement that a trust must not have a purpose that is unlawful or against public policy, see Restatement (Third) of Trusts §§ 27-30 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts §§ 59-65 (1959). A trust with a purpose that is unlawful or against public policy is invalid. Depending on when the violation occurred, the trust may be invalid at its inception or it may become invalid at a later date. The invalidity may also affect only particular provisions. Generally, a trust has a purpose which is illegal if (1) its performance involves the commission of a criminal or tortious act by the trustee; (2) the settlor's purpose in creating the trust was to defraud creditors or others; or (3) the consideration for the creation of the trust was illegal. See Restatement (Third) of Trusts § 28 cmt. a (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts § 60 cmt. a (1959). Purposes violative of public policy include those that tend to encourage criminal or tortious conduct, that interfere with freedom to marry or encourage divorce, that limit religious freedom, or which are frivolous or capricious. See Restatement (Third) of Trusts § 29 cmt. d-h (Tentative Draft No. 2, 1999); Restatement (Second) of Trusts § 62 (1959).

Pursuant to Section 402(a), a trust must have an identifiable beneficiary unless the trust is

of a type that does not have beneficiaries in the usual sense, such as a charitable trust or, as provided in Sections 408 and 409, trusts for the care of an animal or other valid noncharitable purpose. The general purpose of trusts having identifiable beneficiaries is to benefit those beneficiaries in accordance with their interests as defined in the trust's terms. The requirement of this section that a trust and its terms be for the benefit of its beneficiaries, which is derived from Restatement (Third) of Trusts § 27(2) (Tentative Draft No. 2, approved 1999), implements this general purpose. While a settlor has considerable latitude in specifying how a particular trust purpose is to be pursued, the administrative and other nondispositive trust terms must reasonably relate to this purpose and not divert the trust property to achieve a trust purpose that is invalid, such as one which is frivolous or capricious. See Restatement (Third) of Trusts § 27 cmt. b (Tentative Draft No. 2, approved 1999).

Section 412(b), which allows the court to modify administrative terms that are impracticable, wasteful, or impair the trust's administration, is a specific application of the requirement that a trust and its terms be for the benefit of the beneficiaries. The fact that a settlor suggests or directs an unlawful or other inappropriate means for performing a trust does not invalidate the trust if the trust has a substantial purpose that can be achieved by other methods. See Restatement (Third) of Trusts § 28 cmt. e (Tentative Draft No. 2, approved 1999).

SECTION 405. CHARITABLE PURPOSES; ENFORCEMENT.

(a) A charitable trust may be created for the relief of poverty, the advancement of education or religion, the promotion of health, governmental or municipal purposes, or other purposes the achievement of which is beneficial to the community.

(b) If the terms of a charitable trust do not indicate a particular charitable purpose or beneficiary, the court may select one (1) or more charitable purposes or beneficiaries. The selection must be consistent with the settlor's intention to the extent it can be ascertained.

(c) The settlor of a charitable trust, among others, may maintain a proceeding to enforce the trust.

Comment

The required purposes of a charitable trust specified in subsection (a) restate the well-established categories of charitable purposes listed in Restatement (Third) of Trusts § 28 (Tentative Draft No. 3, approved 2001), and Restatement (Second) of Trusts § 368 (1959), which ultimately derive from the Statute of Charitable Uses, 43 Eliz. I, c.4 (1601). The directive to the

courts to validate purposes the achievement of which are beneficial to the community has proved to be remarkably adaptable over the centuries. The drafters concluded that it should not be disturbed.

Charitable trusts are subject to the restriction in Section 404 that a trust purpose must be legal and not contrary to public policy. This would include trusts that involve invidious discrimination. See Restatement (Third) of Trusts § 28 cmt. f (Tentative Draft No. 3, 2001).

Under subsection (b), a trust that states a general charitable purpose does not fail if the settlor neglected to specify a particular charitable purpose or organization to receive distributions. The court may instead validate the trust by specifying particular charitable purposes or recipients, or delegate to the trustee the framing of an appropriate scheme. See Restatement (Second) of Trusts § 397 cmt. d (1959). Subsection (b) of this section is a corollary to Section 413, which states the doctrine of cy pres. Under Section 413(a), a trust failing to state a general charitable purpose does not fail upon failure of the particular means specified in the terms of the trust. The court must instead apply the trust property in a manner consistent with the settlor's charitable purposes to the extent they can be ascertained.

Subsection (b) does not apply to the long-established estate planning technique of delegating to the trustee the selection of the charitable purposes or recipients. In that case, judicial intervention to supply particular terms is not necessary to validate the creation of the trust. The necessary terms instead will be supplied by the trustee. See Restatement (Second) of Trusts § 396 (1959). Judicial intervention under subsection (b) will become necessary only if the trustee fails to make a selection. See Restatement (Second) of Trusts § 397 cmt. d (1959). Pursuant to Section 110(b), the charitable organizations selected by the trustee would not have the rights of qualified beneficiaries under this Code because they are not expressly designated to receive distributions under the terms of the trust.

Contrary to Restatement (Second) of Trusts § 391 (1959), subsection (c) grants a settlor standing to maintain an action to enforce a charitable trust. The grant of standing to the settlor does not negate the right of the state attorney general or persons with special interests to enforce either the trust or their interests. For the law on the enforcement of charitable trusts, see Susan N. Gary, *Regulating the Management of Charities: Trust Law, Corporate Law, and Tax Law*, 21 U. Hawaii L. Rev. 593 (1999).

SECTION 406. CREATION OF TRUST INDUCED BY FRAUD, DURESS, OR UNDUE INFLUENCE. A trust is void to the extent its creation was induced by fraud, duress, or undue influence.

Comment

This section is a specific application of Restatement (Third) of Trusts § 12 (Tentative Draft No. 1, approved 1996), and Restatement (Second) of Trusts § 333 (1959), which provide that a trust can be set aside or reformed on the same grounds as those which apply to a transfer of property not in trust, among which include undue influence, duress, and fraud, and mistake. This section addresses undue influence, duress, and fraud. For reformation of a trust on grounds of mistake, see Section 415. See also Restatement (Third) of Property: Wills and Other Donative Transfers § 8.3 (Tentative Draft No. 3, approved 2001), which closely tracks the language above. Similar to a will, the invalidity of a trust on grounds of undue influence, duress, or fraud may be in whole or in part.

SECTION 407. EVIDENCE OF ORAL TRUST. Except as required by a statute other than this chapter[Code], a trust need not be evidenced by a trust instrument, but the creation of an oral trust and its terms may be established only by clear and convincing evidence.

Comment

While it is always advisable for a settlor to reduce a trust to writing, the Uniform Trust Code follows established law in recognizing oral trusts. Such trusts are viewed with caution, however. The requirement of this section that an oral trust can be established only by clear and convincing evidence is a higher standard than is in effect in many States. See Restatement (Third) of Trusts § 20 Reporter's Notes (Tentative Draft No. 1, approved 1996).

Absent some specific statutory provision, such as a provision requiring that transfers of real property be in writing, a trust need not be evidenced by a writing. States with statutes of frauds or other provisions requiring that the creation of certain trusts must be evidenced by a writing may wish specifically to cite such provisions.

For the Statute of Frauds generally, see Restatement (Second) of Trusts §§ 40-52 (1959). For a description of what the writing must contain, assuming that a writing is required, see Restatement (Third) of Trusts § 22 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts § 46-49 (1959). For a discussion of when the writing must be signed, see Restatement (Third) of Trusts § 23 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts § 41-42 (1959). For the law of oral trusts, see Restatement (Third) of Trusts § 20 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts §§ 43-45 (1959).

SECTION 408. TRUST FOR CARE OF ANIMAL.

(a) A trust may be created to provide for the care of an animal alive during the settlor's lifetime. The trust terminates upon the death of the animal or, if the trust was created to provide

for the care of more than one (1) animal alive during the settlor's lifetime, upon the death of the last surviving animal. The trust may not be enforced for more than ninety (90) years.

(b) A trust authorized by this section may be enforced by any of the following who are appointed under the terms of the trust: a trustee, trust advisor, trust protector or other person-a person appointed in the terms of the trust or, if no person is so appointed, by a person appointed by the court. In addition, a person having an interest in the welfare of the animal may request the court to appoint a person to enforce the trust or to remove a person appointed.

(c) Property of a trust authorized by this section may be applied only to its intended use, except to the extent the court determines that the value of the trust property exceeds the amount required for the intended use. Except as otherwise provided in the terms of the trust, property not required for the intended use must be distributed to the settlor, if then living, otherwise to the settlor's successors in interest.

Comment

This section and the next section of the Code validate so called honorary trusts. Unlike honorary trusts created pursuant to the common law of trusts, which are arguably no more than powers of appointment, the trusts created by this and the next section are valid and enforceable. For a discussion of the common law doctrine, see Restatement (Third) of Trusts § 47 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts § 124 (1959).

This section addresses a particular type of honorary trust, the trust for the care of an animal. Section 409 specifies the requirements for trusts without ascertainable beneficiaries that are created for other noncharitable purposes. A trust for the care of an animal may last for the life of the animal. While the animal will ordinarily be alive on the date the trust is created, an animal may be added as a beneficiary after that date as long as the addition is made prior to the settlor's death. Animals in gestation but not yet born at the time of the trust's creation may also be covered by its terms. A trust authorized by this section may be created to benefit one designated animal or several designated animals.

Subsection (b) addresses enforcement. Noncharitable trusts ordinarily may be enforced by their beneficiaries. Charitable trusts may be enforced by the State's attorney general or by a person deemed to have a special interest. See Restatement (Second) of Trusts § 391 (1959). But at common law, a trust for the care of an animal or a trust without an ascertainable beneficiary

created for a noncharitable purpose was unenforceable because there was no person authorized to

enforce the trustee's obligations.

Sections 408 and 409 close this gap. The intended use of a trust authorized by either section may be enforced by a person designated in the terms of the trust or, if none, by a person appointed by the court. In either case, Section 110(b) grants to the person appointed the rights of a qualified beneficiary for the purpose of receiving notices and providing consents. If the trust is created for the care of an animal, a person with an interest in the welfare of the animal has standing to petition for an appointment. The person appointed by the court to enforce the trust should also be a person who has exhibited an interest in the animal's welfare. The concept of granting standing to a person with a demonstrated interest in the animal's welfare is derived from the Uniform Guardianship and Protective Proceedings Act, which allows a person interested in the welfare of a ward or protected person to file petitions on behalf of the ward or protected person. See, e.g., Uniform Probate Code §§ 5-210(b), 5-414(a).

Subsection (c) addresses the problem of excess funds. If the court determines that the trust property exceeds the amount needed for the intended purpose and that the terms of the trust do not direct the disposition, a resulting trust is ordinarily created in the settlor or settlor's successors in interest. See Restatement (Third) of Trusts § 47 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts § 124 (1959). Successors in interest include the beneficiaries under the settlor's will, if the settlor has a will, or in the absence of an effective will provision, the settlor's heirs. The settlor may also anticipate the problem of excess funds by directing their disposition in the terms of the trust. The disposition of excess funds is within the settlor's control. See Section 105(a). While a trust for an animal is usually not created until the settlor's death, subsection (a) allows such a trust to be created during the settlor's lifetime. Accordingly, if the settlor is still living, subsection (c) provides for distribution of excess funds to the settlor, and not to the settlor's successors in interest.

Should the means chosen not be particularly efficient, a trust created for the care of an animal can also be terminated by the trustee or court under Section 414. Termination of a trust under that section, however, requires that the trustee or court develop an alternative means for carrying out the trust purposes. See Section 414(c).

This section and the next section are suggested by Section 2-907 of the Uniform Probate Code, but much of this and the following section is new.

SECTION 409. NONCHARITABLE TRUST WITHOUT ASCERTAINABLE

BENEFICIARY. Except as otherwise provided in Section 91-408 or by another statute, the following rules apply:

- (1) A trust may be created for a noncharitable purpose without a definite or definitely

ascertainable beneficiary or for a noncharitable but otherwise valid purpose to be selected by the trustee. The trust may not be enforced for more than ninety (90)~~[21]~~ years;

(2) A trust authorized by this section may be enforced by any of the following who are appointed under the terms of the trust: a trustee, trust advisor, trust protector or other person~~appointed in the terms of the trust~~ or, if no person is so appointed, by a person appointed by the court.

(3) Property of a trust authorized by this section may be applied only to its intended use, except to the extent the court determines that the value of the trust property exceeds the amount required for the intended use. Except as otherwise provided in the terms of the trust, property not required for the intended use must be distributed to the settlor, if then living, otherwise to the settlor's successors in interest.

Comment

This section authorizes two types of trusts without ascertainable beneficiaries; trusts for general but noncharitable purposes, and trusts for a specific noncharitable purpose other than the care of an animal, on which see Section 408. Examples of trusts for general noncharitable purposes include a bequest of money to be distributed to such objects of benevolence as the trustee might select. Unless such attempted disposition was interpreted as charitable, at common law the disposition was honorary only and did not create a trust. Under this section, however, the disposition is enforceable as a trust for a period of up to 21 years, although that number is placed in brackets to indicate that States may wish to select a different time limit.

The most common example of a trust for a specific noncharitable purpose is a trust for the care of a cemetery plot. The lead-in language to the section recognizes that some special purpose trusts, particularly those for care of cemetery plots, are subject to other statutes. Such legislation will typically endeavor to facilitate perpetual care as opposed to care limited to 21 years as under this section.

For the requirement that a trust, particularly the type of trust authorized by this section, must have a purpose that is not capricious, see Section 404 Comment. For examples of the types of trusts authorized by this section, see Restatement (Third) of Trusts § 47 (Tentative Draft No. 2, approved 1999), and Restatement (Second) of Trusts § 62 cmt. w and § 124 (1959). The case law on capricious purposes is collected in 2 Austin W. Scott & William F. Fratcher, *The Law of Trusts* § 124.7 (4th ed. 1987).

This section is similar to Section 408, although less detailed. Much of the Comment to Section 408 also applies to this section.

SECTION 410. MODIFICATION OR TERMINATION OF TRUST;
PROCEEDINGS FOR APPROVAL OR DISAPPROVAL.

(a) In addition to the methods of termination prescribed by ~~s~~Sections 91-__-411 through 91-__-414, a trust terminates to the extent the trust is revoked or expires pursuant to its terms, no purpose of the trust remains to be achieved, or the purposes of the trust have become unlawful, ~~contrary to public policy,~~ or impossible to achieve.

(b) A proceeding to approve or disapprove a proposed modification or termination under ~~s~~Sections 91-__-411 through 91-__-416, or trust combination or division under ~~s~~Section 91-__-417, may be commenced by a trustee or beneficiary, ~~[and a proceeding to approve or disapprove a proposed modification or termination under Section 411 may be commenced by the settlor].~~ The settlor of a charitable trust may maintain a proceeding to modify the trust under ~~s~~Section 91-__-413.

~~(c) Nothing in this section or this chapter is intended to create or imply a duty for a trustee to make or seek approval of a modification, termination, combination or division, and a trustee is not liable for not making or seeking approval of a modification, termination, combination or division.~~

~~(d) No modification, termination, combination or division may be made pursuant to sections 91-__-411 through 91-__-417 that:~~

~~(1) results in the trust not qualifying for the federal or state marital or charitable income, gift or inheritance [estate] tax deduction if the trust would qualify but for the modification, termination, combination or division;~~

~~(2) results in the trust being subject to the federal or state generation-skipping~~

transfer tax if the trust would not be subject to the generation-skipping transfer tax but for the modification, termination, combination or division; or

(3) results in an overall increase in federal or state estate, inheritance, gift or generation-skipping transfer taxes.

Comment

Subsection (a) lists the grounds on which trusts typically terminate. For a similar formulation, see Restatement (Third) of Trusts Section 61 (Tentative Draft No. 3, approved 2001). Terminations under subsection (a) may be in either in whole or in part. Other types of terminations, all of which require action by a court, trustee, or beneficiaries, are covered in Sections 411-414, which also address trust modification. Of these sections, all but Section 411 apply to charitable trusts and all but Section 413 apply to noncharitable trusts.

Withdrawal of the trust property is not an event terminating a trust. The trust remains in existence although the trustee has no duties to perform unless and until property is later contributed to the trust.

Subsection (b) specifies the persons who have standing to seek court approval or disapproval of proposed trust modifications, terminations, combinations, or divisions. An approval or disapproval may be sought for an action that does not require court permission, including a petition questioning the trustee's distribution upon termination of a trust under \$50,000 (Section 414), and a petition to approve or disapprove a proposed trust division or consolidation (Section 417). Subsection (b) makes the settlor an interested person with respect to a judicial proceeding brought by the beneficiaries under Section 411 to terminate or modify a

trust. Contrary to Restatement (Second) of Trusts Section 391 (1959), subsection (b) grants a settlor standing to petition the court under Section 413 to apply cy pres to modify the settlor's charitable trust.

2004 Amendment. For an explanation of why a portion of subsection (b) has been placed in brackets, see the comment to the 2004 Amendment to Section 411.

SECTION 411. MODIFICATION OR TERMINATION OF NONCHARITABLE IRREVOCABLE TRUST BY CONSENT.

[(a) During the settlor's lifetime, a noncharitable irrevocable trust may be modified or terminated by the trustee upon consent of all qualified beneficiaries, even if the modification or termination is inconsistent with a material purpose of the trust if the settlor does not object to the proposed modification or termination. The trustee shall notify the settlor of the proposed modification or termination not less than sixty (60) days before initiating the modification or termination. The notice of modification or termination must include:

_____ (1) an explanation of the reasons for the proposed modification or termination;

_____ (2) the date on which the proposed modification or termination is anticipated to occur; and

_____ (3) the date, not less than sixty (60) days after the giving of notice, by which the settlor must notify the trustee of an objection to the proposed modification or termination.

[A noncharitable irrevocable trust may be modified or terminated upon consent of the settlor and all beneficiaries, even if the modification or termination is inconsistent with a material purpose of the trust.] [If, upon petition, the court finds that the settlor and all beneficiaries consent to the modification or termination of a noncharitable irrevocable trust, the court shall approve the modification or termination even if the modification or termination is inconsistent

~~with a material purpose of the trust.] A settlor's power to consent to a trust's modification or termination may be exercised by an agent under a power of attorney only to the extent expressly authorized by the power of attorney or the terms of the trust; by the settlor's [conservator] with the approval of the court supervising the [conservatorship] if an agent is not so authorized; or by the settlor's [guardian] with the approval of the court supervising the [guardianship] if an agent is not so authorized and a conservator has not been appointed. [This subsection does not apply to irrevocable trusts created before or to revocable trusts that become irrevocable before [the effective date of this [Code] [amendment]].]~~

(b) Following the settlor's death, a noncharitable irrevocable trust may be terminated upon consent of all of the beneficiaries if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust. A noncharitable irrevocable trust may be modified upon consent of all of the beneficiaries if the court concludes that modification is not inconsistent with a material purpose of the trust.

~~[(c) A spendthrift provision in the terms of the trust is not presumed to constitute a material purpose of the trust.]~~

(cd) Upon termination of a trust under subsection (a) or (b), the trustee shall distribute the trust property as agreed by the qualified beneficiaries.

(de) If not all of the qualified beneficiaries consent to a proposed modification or termination of the trust under subsection (a) or (b), the modification or termination may be approved by the court if the court is satisfied that:

(1) if all of the beneficiaries had consented, the trust could have been modified or terminated under this section; and

(2) the interests of a qualified beneficiary who does not consent will be adequately protected.

(e) Solely for purposes of this section, the term “noncharitable irrevocable trust”

refers to a trust that is not revocable by the settlor with respect to which:

(1) no federal or state income, gift, estate or inheritance tax charitable deduction was allowed upon transfers to the trust; and

(2) the value of all interests in the trust owned by charitable organizations does not exceed five percent (5%) of the value of the trust.

(f) Notwithstanding subsection (a), the trustee may seek court approval of a modification or termination.

Comment

This section describes the circumstances in which termination or modification of a noncharitable irrevocable trust may be compelled by the beneficiaries, with or without the concurrence of the settlor. For provisions governing modification or termination of trusts without the need to seek beneficiary consent, see Sections 412 (modification or termination due to unanticipated circumstances or inability to administer trust effectively), 414 (termination or modification of uneconomic noncharitable trust), and 416 (modification to achieve settlor’s tax objectives). If the trust is revocable by the settlor, the method of revocation specified in Section 602 applies.

Subsection (a), which was placed in brackets pursuant to a 2004 amendment, states the test for termination or modification by the beneficiaries with the concurrence of the settlor. For an explanation of why subsection (a) has been placed in brackets, see the 2004 comment at the end of this section.

Subsection (b) states the test for termination or modification by unanimous consent of the

beneficiaries without the concurrence of the settlor. The rules on trust termination in Subsections (a)-(b) carries forward the Claflin rule, first stated in the famous case of *Claflin v. Claflin*, 20 N.E. 454 (Mass. 1889). Subsection (c) addresses the effect of a spendthrift provision. Subsection (d) directs how the trust property is to be distributed following a termination under either subsection (a) or (b). Subsection (e) creates a procedure for judicial approval of a proposed termination or modification when the consent of less than all of the beneficiaries is available.

Under this section, a trust may be modified or terminated over a trustee's objection. However, pursuant to Section 410, the trustee has standing to object to a proposed termination or modification.

The settlor's right to join the beneficiaries in terminating or modifying a trust under this section does not rise to the level of a taxable power. See Treas. Reg. Section 20.2038-1(a)(2). No gift tax consequences result from a termination as long as the beneficiaries agree to distribute the trust property in accordance with the value of their proportionate interests.

The provisions of Article 3 on representation, virtual representation and the appointment and approval of representatives appointed by the court apply to the determination of whether all beneficiaries have signified consent under this section. The authority to consent on behalf of another person, however, does not include authority to consent over the other person's objection. See Section 301(b). Regarding the persons who may consent on behalf of a beneficiary, see Sections 302 through 305. A consent given by a representative is invalid to the extent there is a conflict of interest between the representative and the person represented. Given this limitation, virtual representation of a beneficiary's interest by another beneficiary pursuant to Section 304 will rarely be available in a trust termination case, although it should be routinely available in cases involving trust modification, such as a grant to the trustee of additional powers. If virtual or other form of representation is unavailable, Section 305 of the Code permits the court to appoint a representative who may give the necessary consent to the proposed modification or termination on behalf of the minor, incapacitated, unborn, or unascertained beneficiary. The ability to use virtual and other forms of representation to consent on a beneficiary's behalf to a trust termination or modification has not traditionally been part of the law, although there are some notable exceptions. Compare Restatement (Second) Section 337(1) (1959) (beneficiary must not be under incapacity), with *Hatch v. Riggs National Bank*, 361 F.2d 559 (D.C. Cir. 1966) (guardian ad litem authorized to consent on beneficiary's behalf).

Subsection (a) also addresses the authority of an agent, conservator, or guardian to act on a settlor's behalf. Consistent with Section 602 on revocation or modification of a revocable trust, the section assumes that a settlor, in granting an agent general authority, did not intend for the agent to have authority to consent to the termination or modification of a trust, authority that could be exercised to radically alter the settlor's estate plan. In order for an agent to validly consent to a termination or modification of the settlor's revocable trust, such authority must be expressly conveyed either in the power or in the terms of the trust.

Subsection (a), however, does not impose restrictions on consent by a conservator or guardian, other than prohibiting such action if the settlor is represented by an agent. The section instead leaves the issue of a conservator's or guardian's authority to local law. Many conservatorship statutes recognize that termination or modification of the settlor's trust is a sufficiently important transaction that a conservator should first obtain the approval of the court supervising the conservatorship. See, e.g., Unif. Probate Code Section 5-411(a)(4). Because the Uniform Trust Code uses the term "conservator" to refer to the person appointed by the court to manage an individual's property (see Section 103(5)), a guardian may act on behalf of a settlor under this section only if a conservator has not been appointed.

Subsection (a) is similar to Restatement (Third) of Trusts Section 65(2) (Tentative Draft No. 3, approved 2001), and Restatement (Second) of Trusts Section 338(2) (1959), both of which permit termination upon joint action of the settlor and beneficiaries. Unlike termination by the beneficiaries alone under subsection (b), termination with the concurrence of the settlor does not require a finding that the trust no longer serves a material purpose. No finding of failure of material purpose is required because all parties with a possible interest in the trust's continuation, both the settlor and beneficiaries, agree there is no further need for the trust. Restatement Third goes further than subsection (b) of this section and Restatement Second, however, in also allowing the beneficiaries to compel termination of a trust that still serves a material purpose if the reasons for termination outweigh the continuing material purpose.

Subsection (b), similar to Restatement Third but not Restatement Second, allows modification by beneficiary action. The beneficiaries may modify any term of the trust if the modification is not inconsistent with a material purpose of the trust. Restatement Third, though, goes further than this Code in also allowing the beneficiaries to use trust modification as a basis for removing the trustee if removal would not be inconsistent with a material purpose of the trust. Under the Code, however, Section 706 is the exclusive provision on removal of trustees. Section 706(b)(4) recognizes that a request for removal upon unanimous agreement of the qualified beneficiaries is a factor for the court to consider, but before removing the trustee the court must also find that such action best serves the interests of all the beneficiaries, that removal is not inconsistent with a material purpose of the trust, and that a suitable cotrustee or successor trustee is available. Compare Section 706(b)(4), with Restatement (Third) Section 65 cmt. f (Tentative Draft No. 3, approved 2001).

The requirement that the trust no longer serve a material purpose before it can be terminated by the beneficiaries does not mean that the trust has no remaining function. In order to be material, the purpose remaining to be performed must be of some significance:

Material purposes are not readily to be inferred. A finding of such a purpose generally requires some showing of a particular concern or objective on the part of the settlor, such as concern with regard to the beneficiary's management skills, judgment, or level of maturity. Thus, a court may look for some circumstantial or other evidence indicating that the trust arrangement represented to the settlor more than a method of allocating the

benefits of property among multiple beneficiaries, or a means of offering to the beneficiaries (but not imposing on them) a particular advantage. Sometimes, of course, the very nature or design of a trust suggests its protective nature or some other material purpose.

Restatement (Third) of Trusts Section 65 cmt. d (Tentative Draft No. 3, approved 2001).

Subsection (c) of this section deals with the effect of a spendthrift provision on the right of a beneficiary to concur in a trust termination or modification. By a 2004 amendment, subsection (c) has been placed in brackets and thereby made optional. Spendthrift terms have sometimes been construed to constitute a material purpose without inquiry into the intention of the particular settlor. For examples, see Restatement (Second) of Trusts Section 337 (1959); George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* Section 1008 (Rev. 2d ed. 1983); and 4 Austin W. Scott & William F. Fratcher, *The Law of Trusts* Section 337 (4th ed. 1989). This result is troublesome because spendthrift provisions are often added to instruments with little thought. Subsection (c), similar to Restatement (Third) of Trusts Section 65 cmt. e (Tentative Draft No. 3, approved 2001), does not negate the possibility that continuation of a trust to assure spendthrift protection might have been a material purpose of the particular settlor. The question of whether that was the intent of a particular settlor is instead a matter of fact to be determined on the totality of the circumstances.

Subsection (d) recognizes that the beneficiaries' power to compel termination of the trust includes the right to direct how the trust property is to be distributed. While subsection (a) requires the settlor's consent to terminate an irrevocable trust, the settlor does not control the subsequent distribution of the trust property. Once termination has been approved, how the trust property is to be distributed is solely for the beneficiaries to decide.

Subsection (e), similar to Restatement (Third) of Trusts Section 65 cmt. c (Tentative Draft No. 3, approved 2001), and Restatement (Second) of Trusts Sections 338(2) & 340(2) (1959), addresses situations in which a termination or modification is requested by less than all the beneficiaries, either because a beneficiary objects, the consent of a beneficiary cannot be obtained, or representation is either unavailable or its application uncertain. Subsection (e) allows the court to fashion an appropriate order protecting the interests of the nonconsenting beneficiaries while at the same time permitting the remainder of the trust property to be distributed without restriction. The order of protection for the nonconsenting beneficiaries might include partial continuation of the trust, the purchase of an annuity, or the valuation and cashout of the interest.

2003 Amendment. The amendment, which adds the language "modification or" to subsection (a), fixes an inadvertent omission. It was the intent of the drafting committee that an agent with authority or a conservator or guardian with the approval of the court be able to participate not only in a decision to terminate a trust but also in a decision to modify it.

2004 Amendments.

Section 411(a), Section 301(d), and Conforming Changes to Sections 301(c) and 410(b).

Section 411(a) was amended in 2004 on the recommendation of the Estate and Gift Taxation Committee of the American College of Trust and Estate Counsel (ACTEC). Enacting jurisdictions now have several options all of which are indicated by brackets:

- delete subsection (a), meaning that the state's prior law would control on this issue.
- require court approval of the modification or termination.
- make the provision prospective and applicable only to irrevocable trusts created on or after the effective date or to revocable trusts that become irrevocable on or after the effective date of the provision.
- enact subsection (a) in its original form.

Section 411(a), as originally drafted did not require that a court approve a joint decision of the settlor and beneficiaries to terminate or modify an irrevocable trust. The ACTEC Committee was concerned that:

- Section 411(a), without amendment, could potentially result in the taxation for federal estate tax purposes of irrevocable trusts created in states which previously required that a court approve a settlor/beneficiary termination or modification; and
- Because of the ability of a settlor under Section 301 to represent and bind a beneficiary with respect to a termination or modification of an irrevocable trust, Section 411(a) might result in inclusion of the trust in the settlor's gross estate. New Section 301(d) eliminates the possibility of such representation.

The Drafting Committee recommends that all jurisdictions enact the amendment to Section 301(d). The Drafting Committee recommends that jurisdictions conform Section 411(a) to prior law on whether or not court approval is necessary for the settlor and beneficiaries to jointly terminate or modify an irrevocable trust. If prior law is in doubt, the enacting jurisdiction may wish to make Section 411(a) prospective only. The enacting jurisdiction may also elect to delete Section 411(a).

States electing to delete Section 411(a) should also delete the cross-references to Section 411 found in Sections 301(c) and 410(b). These cross-references have therefore been placed in brackets. States electing to delete Section 411(a) should also not enact Section 301(d), which for this reason has similarly been placed in brackets.

Section 411(c)

Section 411(c), which by the 2004 amendment was placed in brackets and therefore made optional, provides that a spendthrift provision is not presumed to constitute a material purpose of the trust. Several states that have enacted the Code have not agreed with the provision and have either deleted it or have reversed the presumption. Given these developments, the Drafting Committee concluded that uniformity could not be achieved. The Joint Editorial Board for Uniform Trusts and Estates Acts, however, is of the view that the better approach is to enact subsection (c) in its original form for the reasons stated in the comment to this Section.

SECTION 412. MODIFICATION OR TERMINATION BECAUSE OF UNANTICIPATED CIRCUMSTANCES OR INABILITY TO ADMINISTER TRUST EFFECTIVELY.

(a) The court may modify the administrative or dispositive terms of a trust or terminate the trust if, because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust. To the extent practicable, the modification must be made in accordance with the settlor's probable intention.

(b) The court may modify the administrative terms of a trust if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust's administration.

(c) Upon termination of a trust under this section, the trustee shall distribute the trust property in a manner consistent with the purposes of the trust.

Comment

This section broadens the court's ability to apply equitable deviation to terminate or modify a trust. Subsection (a) allows a court to modify the dispositive provisions of the trust as well as its administrative terms. For example, modification of the dispositive provisions to increase support of a beneficiary might be appropriate if the beneficiary has become unable to provide for support due to poor health or serious injury. Subsection (a) is similar to Restatement (Third) of Trusts Section 66(1) (Tentative Draft No. 3, approved 2001), except that this section, unlike the Restatement, does not impose a duty on the trustee to petition the court if the trustee is aware of circumstances justifying judicial modification. The purpose of the "equitable deviation" authorized by subsection (a) is not to disregard the settlor's intent but to modify inopportune details to effectuate better the settlor's broader purposes. Among other things, equitable deviation may be used to modify administrative or dispositive terms due to the failure

to anticipate economic change or the incapacity of a beneficiary. For numerous illustrations, see Restatement (Third) of Trusts Section 66 cmt. b (Tentative Draft No. 3, approved 2001). While it is necessary that there be circumstances not anticipated by the settlor before the court may grant relief under subsection (a), the circumstances may have been in existence when the trust was created. This section thus complements Section 415, which allows for reformation of a trust based on mistake of fact or law at the creation of the trust.

Subsection (b) broadens the court's ability to modify the administrative terms of a trust. The standard under subsection (b) is similar to the standard for applying cy pres to a charitable trust. See Section 413(a). Just as a charitable trust may be modified if its particular charitable purpose becomes impracticable or wasteful, so can the administrative terms of any trust, charitable or noncharitable. Subsections (a) and (b) are not mutually exclusive. Many situations justifying modification of administrative terms under subsection (a) will also justify modification under subsection (b). Subsection (b) is also an application of the requirement in Section 404 that a trust and its terms must be for the benefit of its beneficiaries. See also Restatement (Third) of Trusts Section 27(2) & cmt. b (Tentative Draft No. 2, approved 1999). Although the settlor is granted considerable latitude in defining the purposes of the trust, the principle that a trust have a purpose which is for the benefit of its beneficiaries precludes unreasonable restrictions on the use of trust property. An owner's freedom to be capricious about the use of the owner's own property ends when the property is impressed with a trust for the benefit of others. See Restatement (Second) of Trusts Section 124 cmt. g (1959). Thus, attempts to impose unreasonable restrictions on the use of trust property will fail. See Restatement (Third) of Trusts Section 27 Reporter's Notes to cmt. b (Tentative Draft No. 2, approved 1999). Subsection (b), unlike subsection (a), does not have a direct precedent in the common law, but various states have insisted on such a measure by statute. See, e.g., Mo. Rev. Stat. Section 456.590.1.

Upon termination of a trust under this section, subsection (c) requires that the trust be distributed in a manner consistent with the purposes of the trust. As under the doctrine of cy pres, effectuating a distribution consistent with the purposes of the trust requires an examination of what the settlor would have intended had the settlor been aware of the unanticipated circumstances. Typically, such terminating distributions will be made to the qualified beneficiaries, often in proportion to the actuarial value of their interests, although the section does not so prescribe. For the definition of qualified beneficiary, see Section 103(13).

Modification under this section, because it does not require beneficiary action, is not precluded by a spendthrift provision.

SECTION 413. CY PRES.

(a) Except as otherwise provided in subsection (b), if a particular charitable purpose becomes unlawful, impracticable, impossible to achieve, obsolete or ineffective~~or wasteful~~:

(1) the trust does not fail, in whole or in part;

(2) the trust property does not revert to the settlor or the settlor's successors in interest; and

(3) the court may apply cy pres to modify or terminate the trust by directing that the trust property be applied or distributed, in whole or in part, in a manner that fulfills as nearly as possible the settlor's charitable intent and purposes~~consistent with the settlor's charitable purposes.~~

(b) A provision in the terms of a charitable trust that would result in distribution of the trust property to a noncharitable beneficiary prevails over the power of the court under subsection

(a) to apply cy pres to modify or terminate the trust only if, when the provision takes effect:

(1) the trust property is to revert to the settlor and the settlor is still living; or

(2) fewer than twenty-one (21) years have elapsed since the date of the trust's creation.

Comment

Subsection (a) codifies the court's inherent authority to apply cy pres. The power may be applied to modify an administrative or dispositive term. The court may order the trust terminated and distributed to other charitable entities. Partial termination may also be ordered if the trust property is more than sufficient to satisfy the trust's current purposes. Subsection (a), which is similar to Restatement (Third) of Trusts § 67 (Tentative Draft No. 3, approved 2001), modifies the doctrine of cy pres by presuming that the settlor had a general charitable intent when a particular charitable purpose becomes impossible or impracticable to achieve. Traditional doctrine did not supply that presumption, leaving it to the courts to determine whether the settlor had a general charitable intent. If such an intent is found, the trust property is applied to other charitable purposes. If not, the charitable trust fails. See Restatement (Second) of Trusts § 399 (1959). In the great majority of cases the settlor would prefer that the property be used for other charitable purposes. Courts are usually able to find a general charitable purpose to which to apply the property, no matter how vaguely such purpose may have been expressed by the settlor. Under subsection (a), if the particular purpose for which the trust was created becomes impracticable, unlawful, impossible to achieve, or wasteful, the trust does not fail. The court instead must either modify the terms of the trust or distribute the property of the trust in a manner consistent with the settlor's charitable purposes.

The settlor, with one exception, may mandate that the trust property pass to a noncharitable beneficiary upon failure of a particular charitable purpose. Responding to concerns

about the clogging of title and other administrative problems caused by remote default provisions upon failure of a charitable purpose, subsection (b) invalidates a gift over to a noncharitable beneficiary upon failure of a particular charitable purpose unless the trust property is to revert to a living settlor or fewer than 21 years have elapsed since the trust's creation. Subsection (b) will not apply to a charitable lead trust, under which a charity receives payments for a term certain with a remainder to a noncharity. In the case of a charitable lead trust, the settlor's particular charitable purpose does not fail upon completion of the specified trust term and distribution of the remainder to the noncharity. Upon completion of the specified trust term, the settlor's particular charitable purpose has instead been fulfilled. For a discussion of the reasons for a provision such as subsection (b), see Ronald Chester, *Cy Pres of Gift Over: The Search for Coherence in Judicial Reform of Failed Charitable Trusts*, 23 Suffolk U. L. Rev. 41 (1989).

The doctrine of cy pres is applied not only to trusts, but also to other types of charitable dispositions, including those to charitable corporations. This section does not control dispositions made in nontrust form. However, in formulating rules for such dispositions, the courts often refer to the principles governing charitable trusts, which would include this Code.

For the definition of charitable purpose, see Section 405(a). Pursuant to Sections 405(c) and 410(b), a petition requesting a court to enforce a charitable trust or to apply cy pres may be maintained by a settlor. Such actions can also be maintained by a cotrustee, the state attorney general, or by a person having a special interest in the charitable disposition. See Restatement (Second) of Trusts § 391 (1959).

SECTION 414. MODIFICATION OR TERMINATION OF UNECONOMIC TRUST.

(a) After notice to the qualified beneficiaries, the trustee of a trust consisting of trust property having a total value less than one hundred thousand dollars (\$100,000)~~[\$50,000]~~ may terminate the trust if the trustee concludes that the value of the trust property is insufficient to justify the cost of administration.

(b) The court may modify or terminate a trust or remove the trustee and appoint a different trustee if it determines that the value of the trust property is insufficient to justify the cost of administration.

(c) Upon termination of a trust under this section, the trustee shall distribute the trust

property to or for the benefit of the beneficiaries, in such shares as the trustee, or the court if [in] a court proceeding, determines, after taking into account the interests of income and remainder beneficiaries so as to conform as nearly as possible to the intention of the settlor, but a trust that qualified for the marital deduction for tax purposes shall only be distributed to the spouse of the settlor for whom the trust was created~~in a manner consistent with the purposes of the trust.~~

(d) This section does not apply to an easement for conservation or preservation.

(e) This section shall not limit the right of a trustee, acting alone, to terminate a trust in accordance with applicable provisions of the governing instrument.

Comment

Subsection (a) assumes that a trust with a value of \$50,000 or less is sufficiently likely to be inefficient to administer that a trustee should be able to terminate it without the expense of a judicial termination proceeding. The amount has been placed in brackets to signal to enacting jurisdictions that they may wish to designate a higher or lower figure. Because subsection (a) is a default rule, a settlor is free to set a higher or lower figure or to specify different procedures or to prohibit termination without a court order. See Section 105 and Article 4 General Comment.

Subsection (b) allows the court to modify or terminate a trust if the costs of administration would otherwise be excessive in relation to the size of the trust. The court may terminate a trust under this section even if the settlor has forbidden it. See Section 105(b)(4). Judicial termination under this subsection may be used whether or not the trust is larger or smaller than \$50,000.

When considering whether to terminate a trust under either subsection (a) or (b), the trustee or court should consider the purposes of the trust. Termination under this section is not always wise. Even if administrative costs may seem excessive in relation to the size of the trust, protection of the assets from beneficiary mismanagement may indicate that the trust be continued. The court may be able to reduce the costs of administering the trust by appointing a new trustee.

Upon termination of a trust under this section, subsection (c) requires that the trust property be distributed in a manner consistent with the purposes of the trust. In addition to outright distribution to the beneficiaries, Section 816(21) authorizes payment to be made by a variety of alternate payees. Distribution under this section will typically be made to the qualified beneficiaries in proportion to the actuarial value of their interests.

Even though not accompanied by the usual trappings of a trust, the creation and transfer of an easement for conservation or preservation will frequently create a charitable trust. The organization to whom the easement was conveyed will be deemed to be acting as trustee of what will ostensibly appear to be a contractual or property arrangement. Because of the fiduciary obligation imposed, the termination or substantial modification of the easement by the “trustee” could constitute a breach of trust. The drafters of the Uniform Trust Code concluded that easements for conservation or preservation are sufficiently different from the typical cash and securities found in small trusts that they should be excluded from this section, and subsection (d) so provides. Most creators of such easements, it was surmised, would prefer that the easement be continued unchanged even if the easement, and hence the trust, has a relatively low market value. For the law of conservation easements, see Restatement (Third) of Property: Servitudes §1.6 (2000).

While this section is not directed principally at honorary trusts, it may be so applied. See

Sections 408, 409.

Because termination of a trust under this section is initiated by the trustee or ordered by the court, termination is not precluded by a spendthrift provision.

SECTION 415. REFORMATION TO CORRECT MISTAKES. The court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence ~~that both~~~~what~~ the settlor's intention ~~was~~ and ~~that~~ the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.

Comment

Reformation of inter vivos instruments to correct a mistake of law or fact is a long-established remedy. Restatement (Third) of Property: Donative Transfers Section 12.1 (Tentative Draft No. 1, approved 1995), which this section copies, clarifies that this doctrine also applies to wills.

This section applies whether the mistake is one of expression or one of inducement. A mistake of expression occurs when the terms of the trust misstate the settlor's intention, fail to include a term that was intended to be included, or include a term that was not intended to be included. A mistake in the inducement occurs when the terms of the trust accurately reflect what the settlor intended to be included or excluded but this intention was based on a mistake of fact or law. See Restatement (Third) of Property: Donative Transfers Section 12.1 cmt. i (Tentative Draft No. 1, approved 1995). Mistakes of expression are frequently caused by scriveners' errors while mistakes of inducement often trace to errors of the settlor.

Reformation is different from resolving an ambiguity. Resolving an ambiguity involves the interpretation of language already in the instrument. Reformation, on the other hand, may involve the addition of language not originally in the instrument, or the deletion of language originally included by mistake, if necessary to conform the instrument to the settlor's intent. Because reformation may involve the addition of language to the instrument, or the deletion of language that may appear clear on its face, reliance on extrinsic evidence is essential. To guard against the possibility of unreliable or contrived evidence in such circumstance, the higher standard of clear and convincing proof is required. See Restatement (Third) of Property: Donative Transfers Section 12.1 cmt. e (Tentative Draft No. 1, approved 1995).

In determining the settlor's original intent, the court may consider evidence relevant to the settlor's intention even though it contradicts an apparent plain meaning of the text. The objective of the plain meaning rule, to protect against fraudulent testimony, is satisfied by the

requirement of clear and convincing proof. See Restatement (Third) of Property: Donative

Transfers Section 12.1 cmt. d and Reporter's Notes (Tentative Draft No. 1, approved 1995). See also John H. Langbein & Lawrence W. Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 U. Pa. L. Rev. 521 (1982).

For further discussion of the rule of this section and its application to illustrative cases, see Restatement (Third) of Property: Donative Transfers Section 12.1 cmts. and Reporter's Notes (Tentative Draft No. 1, approved 1995).

2011 Amendment. This section was revised by technical amendment in 2011. The amendment better conforms the language of the section to the language of the Restatement (Third) of Property provision on which the section is based.

SECTION 416. MODIFICATION TO ACHIEVE SETTLOR'S TAX

OBJECTIVES. To achieve the settlor's tax objectives, the court may modify the terms of a trust in a manner that is not contrary to the settlor's probable intention. The court may provide that the modification has retroactive effect.

Comment

This section is copied from Restatement (Third) of Property: Donative Transfers § 12.2 (Tentative Draft No. 1, approved 1995). "Modification" under this section is to be distinguished from the "reformation" authorized by Section 415. Reformation under Section 415 is available when the terms of a trust fail to reflect the donor's original, particularized intention. The mistaken terms are then reformed to conform to this specific intent. The modification authorized here allows the terms of the trust to be changed to meet the settlor's tax-saving objective as long as the resulting terms, particularly the dispositive provisions, are not inconsistent with the settlor's probable intent. The modification allowed by this subsection is similar in concept to the cy pres doctrine for charitable trusts (see Section 413), and the deviation doctrine for unanticipated circumstances (see Section 412).

Whether a modification made by the court under this section will be recognized under federal tax law is a matter of federal law. Absent specific statutory or regulatory authority, binding recognition is normally given only to modifications made prior to the taxing event, for example, the death of the testator or settlor in the case of the federal estate tax. See Rev. Rul. 73-142, 1973-1 C.B. 405. Among the specific modifications authorized by the Internal Revenue Code or Service include the revision of split-interest trusts to qualify for the charitable deduction, modification of a trust for a noncitizen spouse to become eligible as a qualified domestic trust, and the splitting of a trust to utilize better the exemption from generation-skipping tax.

For further discussion of the rule of this section and the relevant case law, see Restatement (Third) of Property: Donative Transfers § 12.2 cmts. and Reporter's Notes

(Tentative Draft No. 1, approved 1995).

SECTION 417. COMBINATION AND DIVISION OF TRUSTS. After notice to the qualified beneficiaries, a trustee may combine two (2) or more trusts into a single trust or divide a trust into two (2) or more separate trusts, if the result does not impair rights of any beneficiary or adversely affect achievement of the purposes of the trust. If the trusts to be combined or divided have different trustees, the trustees may negotiate the terms of the combined or divided trusts, including which trusts will be the surviving trust or trusts, who will be the trustee or trustees of the surviving trust or trusts and any other matter relating to the operation of the surviving trust or trusts.

Comment

This section, which authorizes the combination or division of trusts, is subject to contrary provision in the terms of the trust. See Section 105 and Article 4 General Comment. Many trust instruments and standardized estate planning forms include comprehensive provisions governing combination and division of trusts. Except for the requirement that the qualified beneficiaries receive advance notice of a proposed combination or division, this section is similar to Restatement (Third) of Trusts § 68 (Tentative Draft No. 3, approved 2001).

This section allows a trustee to combine two or more trusts even though their terms are not identical. Typically the trusts to be combined will have been created by different members of the same family and will vary on only insignificant details, such as the presence of different perpetuities savings periods. The more the dispositive provisions of the trusts to be combined differ from each other the more likely it is that a combination would impair some beneficiary's interest, hence the less likely that the combination can be approved. Combining trusts may prompt more efficient trust administration and is sometimes an alternative to terminating an uneconomic trust as authorized by Section 414. Administrative economies promoted by combining trusts include a potential reduction in trustees' fees, particularly if the trustee charges a minimum fee per trust, the ability to file one trust income tax return instead of multiple returns, and the ability to invest a larger pool of capital more effectively. Particularly if the terms of the trust are identical, available administrative economies may suggest that the trustee has a responsibility to pursue a combination. See Section 805 (duty to incur only reasonable costs).

Division of trusts is often beneficial and, in certain circumstances, almost routine. Division of trusts is frequently undertaken due to a desire to obtain maximum advantage of exemptions available under the federal generation-skipping tax. While the terms of the trusts which result from such a division are identical, the division will permit differing investment

objectives to be pursued and allow for discretionary distributions to be made from one trust and not the other. Given the substantial tax benefits often involved, a failure by the trustee to pursue a division might in certain cases be a breach of fiduciary duty. The opposite could also be true if the division is undertaken to increase fees or to fit within the small trust termination provision. See Section 414.

This section authorizes a trustee to divide a trust even if the trusts that result are

dissimilar. Conflicts among beneficiaries, including differing investment objectives, often invite such a division, although as in the case with a proposed combination of trusts, the more the terms of the divided trusts diverge from the original plan, the less likely it is that the settlor's purposes would be achieved and that the division could be approved.

This section does not require that a combination or division be approved either by the court or by the beneficiaries. Prudence may dictate, however, that court approval under Section 410 be sought and beneficiary consent obtained whenever the terms of the trusts to be combined or the trusts that will result from a division differ substantially one from the other. For the provisions relating to beneficiary consent or ratification of a transaction, or release of trustee from liability, see Section 1009.

While the consent of the beneficiaries is not necessary before a trustee may combine or divide trusts under this section, advance notice to the qualified beneficiaries of the proposed combination or division is required. This is consistent with Section 813, which requires that the trustee keep the beneficiaries reasonably informed of trust administration, including the giving of advance notice to the qualified beneficiaries of several specified actions that may have a major impact on their interests.

Numerous States have enacted statutes authorizing division of trusts, either by trustee action or upon court order. For a list of these statutes, see Restatement (Third) Property: Donative Transfers § 12.2 Statutory Note (Tentative Draft No. 1, approved 1995). Combination or division has also been authorized by the courts in the absence of authorizing statute. See, e.g., *In re Will of Marcus*, 552 N.Y.S. 2d 546 (Surr. Ct. 1990) (combination); *In re Heller Inter Vivos Trust*, 613 N.Y.S. 2d 809 (Surr. Ct. 1994) (division); and *BankBoston v. Marlow*, 701 N.E. 2d 304 (Mass. 1998) (division).

For a provision authorizing a trustee, in distributing the assets of the divided trust, to make non-pro-rata distributions, see Section 816(22).